Nos. 17-586, 17-626

In the Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, *et al.*,

Appellants,

v.

SHANNON PEREZ, *et al.*,

Appellees.

On Appeal to the United States District Court for the Western District of Texas

BRIEF FOR COMMON CAUSE AND THE VOTING RIGHTS INSTITUTE AS *AMICI CURIAE* SUPPORTING APPELLEES

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INTEREST OF THE *AMICI CURIAE*[1]

Founded in 1970, *amicus* Common Cause is a nonprofit, nonpartisan organization dedicated to protecting and strengthening democracy and the democratic process. Its membership now stands at 1.1 million people. Common Cause has, among other things, led the movement to lower the voting age to 18; and spearheaded the passage of freedom-of-information laws, government ethics laws, and laws to limit the corrupting influence of money in politics. Gerrymandering is an issue of longstanding interest to Common Cause at the national level and in its network of 35 state organizations.

Amicus Voting Rights Institute (VRI) is a first-of-its-kind legal institute established to help enforce and protect the rights of American voters. A joint project of Georgetown University Law Center, the Campaign Legal Center, and the American Constitution Society, VRI assists attorneys, expert witnesses, law students, and the public combat discriminatory voting practices across the country. It offers opportunities for students, recent graduates, and fellows to engage in litigation and policy work in the field of voting rights and to educate attorneys about the skills and best practices of voting rights advocates. It also recruits and trains expert witnesses to assist in litigation development and presentation; promotes increased local and national focus on voting rights

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have submitted blanket consents to the filing of *amicus* briefs in this case.

through events, publications and the development of web-based tools; and provides opportunities and platforms for research on voting rights.

This case involves the legality of voting districts that the Texas Legislature originally created in 2011. After the district court invalidated those districts as discriminatory, the court in 2012 permitted use of some of the districts on an interim basis, expressly noting that its interim review had been limited and was subject to revision. In 2013, the Texas Legislature re-enacted the same districts—those originally held to be discriminatory—without change. Texas now argues, in part, that adoption of the district court's interim plan in 2012 effectively insulates the 2013 plan from further review. Because this contention threatens to subject Texas residents (and, if Texas's theory prevails, residents of other States) to discriminatory voting regimes, and because *amici* have considerable experience addressing issues that relate to redistricting, *amici* submit this brief to assist the Court in the resolution of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellees show in their briefs that the challenged Texas districts were created with a discriminatory purpose. That conclusion plainly is correct on the record here: The Texas Legislature knew what it was doing and intended the result when it drew districts that minimized minority voting strength.

In this brief, we focus on two particular, related arguments that Texas and the United States advance in defense of the challenged 2013 redistricting plans in an effort to avoid a conventional—and, from

their perspective, fatal—inquiry into legislative motive.[2] First, Texas maintains that the challenged plans here were "court-drawn" or "court imposed" (see, *e.g.*, Texas Br. i; see also U.S. Br. 24) and that, necessarily, the Legislature's adoption of a plan that had been validated by a federal court could not have been improper. And second, Texas insists that the improper purpose that initially motivated adoption of Plan H283 in 2011 was somehow laundered out of Plan H358 when the Legislature created *identical* districts after the district court's interim approval of those districts in 2012.

These arguments are wrong. The districts challenged here were discriminatory when the Texas Legislature created them in 2011. They had not magically lost their discriminatory purpose when the Legislature re-enacted *the very same districts* two years later.

A. Texas is incorrect when it maintains that the district court validated the challenged districts, and insulated them from review, when it permitted their use in the 2012 interim plan. It is fundamental that courts use different standards when issuing preliminary or interim relief than they do when making a final determination on the merits. The need for expeditious review means that a preliminary ruling is issued on a limited record and with less than full consideration; such a ruling is characterized by what courts have called "its for-the-time-beingness." The

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[2] The arguments in this brief apply both to the Texas House districts incorporated in Plan H358 and to the congressional districts incorporated in Plan C235 that remained unchanged from Texas's 2011 state house and congressional plans. For simplicity's sake, the brief principally discusses Plan H358.

district court here emphasized that is just how it regarded its interim ruling, which it repeatedly said was not definitive and was subject to revision. That ruling does not establish the ultimate validity of the challenged districts, and Texas could not reasonably have relied on it for that purpose.

B. The interim ruling also does not launder the Texas Legislature's discriminatory purpose out of the case. Texas now maintains that it adopted districts included in the interim plan simply to bring an expeditious end to the redistricting litigation. But Texas's stated motive is not the end of the matter: It remains the Court's duty to determine the Legislature's *actual* intent when it chose to re-enact districts that had been held to be the product of a discriminatory purpose. And here, *all* of the usual indicia of legislative intent—including the history, context, and prior judicial constructions of the legislative language—support the district court's finding that the Texas Legislature adopted the 2013 plan with a discriminatory purpose.

ARGUMENT

A. The Texas Legislature initially drew the districts at issue here with a discriminatory purpose.

Appellees address the history of the Texas plan at issue in this case in detail (Appellees' Br. 2-25[3]), and there is no need to repeat that presentation here. But for purposes of the arguments addressed in this brief, one element of the record warrants special emphasis: the district court's findings regarding the

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[3] References here to "Appellees' Brief" are to appellees' brief relating to the State House districts.

discriminatory intent that underlay the initial drawing in 2011 of the Texas House districts at issue here. Because it is the position of Texas and the United States that a plan using those same boundaries was drawn with a benign intent just two years later, it is helpful to bear in mind the specific findings that led the district court to hold those districts to have been constructed with the specific purpose of disadvantaging minority voters.

1. In Nueces County, the district court found that the cartographers acted "in bad faith" when they eliminated HD33 as a Hispanic opportunity district. H.J.S. App. 133a. The court found that it was "undisputed that Nueces County had two benchmark Latino opportunity districts" before the 2010 redistricting cycle. *Ibid.* Legislators had "three options" for how to district Nueces County: "(1) draw one 'performing' Hispanic district and one not; (2) draw two equally Hispanic districts, which may not perform reliably; or (3) see if both Latino opportunity districts could be preserved by splitting county lines." *Id.* at 127a.[4] The mapmakers pursued the first option, despite never "seriously look[ing] at whether § 2 [of the Voting Rights Act ("VRA")] might require two opportunity districts in Nueces County." *Id.* at 127a n.22. Instead, they sought to "offset" the loss of HD33 as an opportunity district by adding more Latinos to

[4] The County Line Rule is a Texas constitutional requirement that legislative districts "preserve whole counties when population mandates permit." Tex. Const. art. III § 26. To the extent the Texas Constitution conflicts with the Voting Rights Act, however, federal law controls.

HD90 and HD148—districts that were already electing minority candidates of choice. *Ibid.*[5]

The court found that the "redistricters knew" that these two districts "were already ability districts, and thus that increasing their SSVR did not create any 'new' ability district to offset the loss of HD33." H.J.S. App. 135a. Hence, the court found that the true motive was "to intentionally dilute Latino voting strength by * * * allowing redistricting leadership to claim that they were complying with the VRA despite eliminating HD33 and creating no new opportunity or ability districts." *Id.* at 137a.

The district court also found "evidence that the mapdrawers (including specifically Rep. Hunter) racially gerrymandered the districts that remained in Nueces County to further undermine Latino voting strength." H.J.S. App. 136a. The court noted that "[t]here are ten precinct splits along the HD32/HD34 border" from which the court inferred that "mapdrawers were likely using race to assign population since accurate political data is not available below the precinct level." *Ibid.* The goal of these splits, according to the district court, was to "intentionally pack[] Hispanic voters into HD32 to minimize their number and influence in HD34" to protect the Republican incumbent. *Ibid.* The court also found evidence that the mapdrawers "targeted low turnout

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[5] The district court also found that the mapmakers intentionally relied on Spanish Surname Voter Registration ("SSVR") as a measure of the relevant Latino population in Nueces County, even though they knew that Hispanic Citizen Voting Age Population ("HCVAP") was the more appropriate measure, because "SSVR was lower (and lower than 50%), and it allowed them to argue that mathematically, two SSVR-majority districts could not be drawn." H.J.S. App 134a.

minority areas" for inclusion in HD34 to protect the Republican incumbent. *Ibid.* Finally, the court found evidence that the mapmakers intentionally overpopulated HD32 (and underpopulated HD34), without a legitimate justification for doing so. *Ibid.* All of these findings contributed to the conclusion that the Texas Legislature had engaged in intentional vote dilution.

2. The district court found that in Dallas County, the mapdrawers intended to "dilute minority voting strength to protect a Republican incumbent in HD105 by intentionally making the district more Anglo." H.J.S. App. 170a. The court found that the "Anglo population decreased by 198,000 in Dallas County" even while the population of Dallas County as a whole grew by 350,000. *Id.* at 261a. As such, the mapmakers knew that two of the three districts in Dallas County would have to be minority districts. See *id.* at 171a. As one advisor to the mapmakers explained, however, it might "get 'worse' because they might have to draw a third Latino district, which would mean the loss of a third Republican seat." *Ibid.* But instead of "exploring whether any additional minority districts could be drawn or maintained to recognize the population growth," the mapmakers decided to pack as many Latino voters as possible into the two minority districts and therefore "eliminated districts that were on track to perform for minority voters." *Ibid.*

In fact, one of the redistricters "admitted to splitting precincts to put the Hispanic population into HD104 and HD103 and the Anglo population in HD105." H.J.S. App. 171a. Although this legislator claimed that he took this step to comply with the VRA, the district court found "that this was yet another example of mapdrawers using superficial com-

pliance with the VRA to dilute minority voting strength rather than enhancing it." *Ibid.* By doing so, the Legislature made it less likely that Latinos would elect their candidate of choice in HD105. *Id.* at 261a & n.35. Hence, the district court found that the Legislature's "true motive was to dilute Latino voting strength in west Dallas County by unnecessarily placing Latinos" into two already Latino districts to make HD105 more Anglo, and more strongly protective of the incumbent Republican. *Id.* at 172a. The district court concluded that this strategy was intentional discrimination in violation of the VRA.

3. The mapmakers split the City of Killeen in Bell County, a paradigmatic community of interest, between two districts "to ensure that" those districts "remained Anglo-majority, and would reelect Republican incumbents." H.J.S. App. 183a. The district court found that "the evidence does indicate that mapdrawers * * * intentionally racially gerrymandered the districts to dilute the minority vote by moving minority population out of HD54 and moving Anglo population in." *Id.* at 181a. Thus, the court concluded that mapmakers swapped minority and Anglo communities to make "it more difficult for minority voters in HD54 to elect their candidate of choice." *Ibid.*

The court reached this conclusion because it found the reasons offered by the mapmaker who split Killeen "not credible." H.J.S. App. 182a-183a. That representative testified that he believed some areas in Bell County had more in common with a neighboring county. *Id.* at 182a. The court, however, rejected that reasoning as "pretextual" cover for his intent to "crack[] and dilut[e] the minority vote to ensure Anglo control over both districts." *Id.* at 181a. Specifi-

cally, although the mapmaker opposed an alternative map that would have kept Killeen whole because it had a "land bridge" that connected Killeen to other communities, "Plan H283 includes land bridges in other areas and he voted for it." *Id.* at 182a-183a. The court concluded that the legislator was motivated by the knowledge that "a minority coalition district [such as Killeen] would not likely have enough Republicans to re-elect him." *Id.* at 182a.

Accordingly, the background of the current controversy is clear and, for present purposes, essentially undisputed. The Texas Legislature drew the particular districts that we address for the specific, race-conscious purpose of disadvantaging Latino voters. The State's arguments to the contrary, the district court found, were pretextual. The question now is whether these findings of improper intent have any bearing on the Texas Legislature's motive in placing the same districts in a plan it enacted two years later.

B. Texas's attempt to equate preliminary findings with a final decision on the merits is unavailing.

In defending districts that initially were drawn for these manifestly improper purposes, Texas insists that the district lines used in Plan H358 must be valid because the district court approved the same lines in the interim plan it set in 2012. As Texas would have it, that approval means that the challenged districts should be treated as court-drawn, so that the district court, in the decision below, found that "*its own maps* were infected with the 'taint of discrimina-

tory intent.'" Texas Br. 1 (emphasis in original).[6] This contention is central to the State's case; as appellees note (Appellees' Br. 1), Texas repeats the assertion that the challenged plan is "court-drawn" or "court imposed" at least eleven times throughout its brief.

This facially improbable contention, however, is wrong. The district court's avowedly preliminary and interim approval of the challenged districts—a product of exigent circumstances and severe time constraints—was not intended to be, and could not reasonably have been taken by Texas legislators to have been intended as, an endorsement of the ultimate validity of these districts. In fact, Texas's novel theory disregards not only the plain meaning of "preliminary" and "interim," but also this Court's longstanding precedent and the Federal Rules' established procedures for combining preliminary and final relief. Plan H358 was not the district court's plan; it was the Texas Legislature's plan. The reality is that all the districts at issue were drawn by the Legislature, some in 2011 and the rest in 2013.

1. A preliminary injunction is not a decision on the merits.

a. Texas's argument is premised on the assumption that the district court's preliminary, interim plan reflects the court's judgment that the districts included in that plan express an ultimate judgment that these districts are valid. But that plainly is not so. As this Court has long recognized, "the findings of fact and conclusions of law made by a court granting

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[6] The United States is more restrained in its characterizations, but does refer to the plan as the court's "own." U.S. Br. 24.

a preliminary injunction are not binding at trial on the merits." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). Although district courts "should make the findings of fact and conclusions of law that are appropriate to the interlocutory proceeding," these findings must not be treated as a "decision * * * on the merits." *Public Serv. Comm'n of Wis.* v. *Wis. Tel. Co.*, 289 U.S. 67, 71 (1933).

It is *because* "the necessity for an expeditious resolution often means that the injunction is issued on a procedure less stringent than that which prevails at the subsequent trial" that preliminary injunctions are not final. *Thornburgh* v. *American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 755-756 (1986), *overruled on other grounds by Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992). On later review, a court may reverse some or all of its initial findings based on a more fully developed record and greater time for deliberation. Thus, "any conclusions reached at the preliminary injunction stage are subject to revision." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985) (citing *Camenisch*, 451 U.S. at 395).

This principle has never been in doubt. As recently as last Term, the Court affirmed that "[c]rafting a preliminary injunction is an exercise of discretion and judgment," the purpose of which "is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (internal citations omitted). The Court has made clear that the same standard governs a district court's decision to accept or depart from elements of a State's pro-

posed redistricting plan when "drafting an interim plan." *Perry* v. *Perez*, 132 S. Ct. 934, 941-942 (2012).

b. Lower courts have consistently recognized the "significant differences between a preliminary injunction and a permanent injunction or other final disposition on the merits." *Zen Music Festivals, L.L.C.* v. *Stewart*, 72 F. App'x 168, 170 (5th Cir. 2003); see also *Ben. Pension Tr.* v. *United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (collecting cases). These holdings have special relevance here: they drive home what the district court in this case meant by its interim ruling—and that Texas surely recognized, both at that time and when it adopted Plan H358, that the interim ruling was *not* a definitive resolution of the propriety of the districts approved by the district court for temporary use in 2012.

Thus, as Judge Jerome Frank wrote for the Second Circuit more than 60 years ago, a "preliminary injunction * * * is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, [and] characterized by its for-the-time-beingness." *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953); see also 42 Am. Jur. 2d *Injunctions* § 276 (2018) (explaining that preliminary injunctions "by their very nature are interlocutory, tentative, and impermanent").

Accordingly, preliminary findings of fact and conclusions of law have "no binding effect whatsoever." *Clark* v. *K-Mart Corp.*, 979 F.2d 965, 969 (3d Cir. 1992) (citing *Camenisch*, 451 U.S. at 395-396)); see also *Industrial Bank of Wash.* v. *Tobriner*, 405 F.2d 1321, 1324 (D.C. Cir. 1968) (explaining that such findings "should not be regarded as binding in further proceedings"). This is because such proceedings

are "based upon procedures that are less formal and evidence that is less complete than in a full trial." *Technical Publ'g Co.* v. *Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984).

2. The district court emphasized the limited nature of its holding.

a. That rule governs in this case. Facing extreme limits on its ability to conduct a full review, the district court repeatedly "emphasize[d] the preliminary and temporary nature" of the 2012 interim map. H.J.S. App. 314a. Contrary to Texas's representations, the district court stressed that "nothing in this opinion reflects this Court's final determination of *any* legal or factual matters." *Id.* 303a (emphasis added).

Little wonder why; the court was operating under "severe time constraints." H.J.S. App. 356a. With barely more than a month to develop its plan, the court was forced to make preliminary findings on an incomplete and underdeveloped record.[7] Due to the

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[7] The resolution of complex redistricting cases almost always takes more time than the district court was able to devote to consideration of the interim challenge in this case. The average time from trial to disposition of a redistricting case in the Fifth Circuit is five months. *See, e.g.*, *Rodriguez* v. *Harris Cty.*, 964 F. Supp. 2d 686 (S.D. Tex 2013) (8.5 months from trial to conclusion that there was no Section 2 violation); *Fairley* v. *City of Hattiesburg*, 122 F. Supp. 3d 553 (S.D. Miss. 2015) (9.5 months from trial to conclusion that there was no Section 2 violation); *Fabela* v. *City of Farmers Branch*, No. 3:10-CV-1425-D (N.D. Tex. Jan. 1, 2013) (6 months from trial to implementation of new plan to remedy Section 2 violations); *Hall* v. *Louisiana*, 108 F. Supp. 3d 119 (M.D. La. 2015) (6.5 months from trial to conclusion that there was no Section 2 violation); *Terrebonne Par. Branch NAACP* v. *Jindal*, 274 F. Supp. 3d 395 (M.D. La. 2017) (3.5 months from trial to conclusion that there was a Section 2

"exigent circumstances created by the need for timely 2012 primaries and general elections in Texas" (*id.* at 303a), the court was not able to—and indeed, did not try to—adjudicate the merits. The court simply did the best that it could, while "warn[ing] repeatedly that its determinations could change after a full trial on the merits." *Id.* at 356a n.42. This is, indeed, a ruling characterized by its "for-the-time-being-ness."

b. Preliminary injunctions are preliminary for this very reason. Courts must make fast determinations on relatively little information. Faced with such record and time constraints, "[i]t is universally true that courts are more willing to grant permanent injunctions than preliminary injunctions." Douglas A. Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687, 731 (1990). And "[p]reliminary injunctions are * * * often denied in substantive areas where all injury is irreparable and permanent injunctions are routine, such as * * * civil rights and civil liberties." *Id.* at 732 (footnote omitted). As remedies scholars have explained, "[t]he reasons a court may be cautious in awarding preliminary relief are clear. The court must act without a full trial, sometimes with only sketchy motion papers and affidavits to guide its decision." *Id.* at 728; see also Linda J. Silberman, *Injunctions by the Numbers: Less*

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violation, with the issue of a remedial map still pending); *Benavidez* v. *Irving Indep. Sch. Dist.*, No. 3:13-CV-0087-D (N.D. Tex. Oct. 20, 2014) (2.5 months from trial to implementation of a new plan to remedy Section 2 violation); *York* v. *City of St. Gabriel*, 89 F. Supp. 3d 843 (M.D. La. 2015) (2 months from trial to conclusion that there was no Section 2 violation); *Patino* v. *City of Pasenda*, 230 F. Supp. 3d 667 (S.D. Tex. 2017) (1 month from trial to implementation of interim map to remedy Section 2 violation).

Than the Sum of Its Parts, 63 Chi.-Kent L. Rev. 279, 300-301 (1987) ("[B]ecause of the preliminary nature of the relief and the expedited nature of the proceeding, there is often not a fully developed factual record. The district judge is often acting more on hunch, probability, and speculation than he would be in a full-scale trial for permanent relief."). Therefore, courts rarely grant full injunctive relief at the preliminary stage.

It is thus no surprise that the district court granted only partial relief here. Acting under severe record and time constraints—and mindful of the cost to the State—the court invalidated only some of the challenged districts. Later, with the full record in hand and time for reflection, the court invalidated additional districts.

This again should come as no surprise to Texas. Courts reverse their determinations between the preliminary and final stages of litigation *all the time*. District courts frequently deny preliminary relief only to grant permanent relief,[8] and vice versa.[9] Appel-

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[8] See, *e.g.*, *United Motorcoach Ass'n, Inc.* v. *City of Austin*, 851 F.3d 489, 492 (5th Cir. 2017) (discussing a district court permanently enjoining the enforcement of a city regulation, despite denial of preliminary relief); *Public Interest Research Grp.* v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64, 69-70 (3d Cir. 1990) (discussing a district court permanently enjoining the defendant from violating a Clean Water Act permit, despite denial of preliminary relief); *Nalpac, Ltd.* v. *Corning Glass Works*, 784 F.2d 752, 753-754 (6th Cir. 1986) (discussing a district court permanently enjoining the defendant from use of a trademark, despite denial of preliminary relief); *Bynes* v. *Toll*, 512 F.2d 252, 253 (2d Cir. 1975) (discussing a district court permanently enjoining the defendant-university from enforcing a discriminatory residency agreement, despite denial of preliminary relief).

late courts likewise reverse preliminary injunctions only to later affirm permanent ones.[10] Preliminary relief is, by its very nature, temporary. There is nothing strange or untoward about the district court revising its initial determinations in light of a finished record and time for considered judgment. Texas cannot claim that its plans were upset by an ordinary reversal of fortunes, of the sort litigants routinely face.

c. Texas unsuccessfully attempts to shrink the gap between preliminary and final relief by suggesting that the district court applied "a standard uniquely favorable to plaintiffs." Reply Supporting H.J.S. 6 (emphasis omitted). This argument misunderstands the governing standard.

That standard is pro "status quo" (42 Am. Jur. 2d *Injunctions* § 9), not pro-plaintiff. A preliminary injunction is an "extraordinary remedy" (*Winter* v. *NRDC*, 555 U.S. 7, 24 (2008)), enacted "merely to preserve the relative positions of the parties until a

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[9] See, *e.g.*, *Sole* v. *Wyner*, 551 U.S. 74, 77 (2007) (addressing whether "a plaintiff who gains a preliminary injunction after an abbreviated hearing, but is denied a permanent injunction after a dispositive adjudication on the merits, qualif[ies] as a 'prevailing party'" for attorneys' fees purposes); *Common Cause/Georgia* v. *Billups*, 554 F.3d 1340, 1347-1348 (11th Cir. 2009) (denying a permanent injunction in a voter ID law case, despite the issuance of preliminary relief).

[10] *Compare Los Angeles Mem'l Coliseum Comm'n* v. *National Football League*, 634 F.2d 1197, 1204 (9th Cir. 1980) (reversing a preliminary injunction, because plaintiffs had not shown a likelihood of irreparable injury), *with Los Angeles Mem'l Coliseum Comm'n* v. *National Football League*, 726 F.2d 1381, 1401 (9th Cir. 1984) (affirming a permanent injunction in the same case, because plaintiffs had shown irreparable injury during the trial).

trial on the merits can be held." *Camenisch*, 451 U.S. at 395. The purpose of the standard is to "balance the equities" (*Trump*, 137 S. Ct. at 2087) and preserve the litigating positions of the parties for trial. For that reason, "[a]n injunction is considered an extraordinary remedy that should be exercised sparingly and cautiously." 42 Am. Jur. 2d *Injunctions* § 17 (footnotes omitted). Here, that standard militated in favor of the court preserving for interim use the district boundaries initially drawn by the Texas Legislature.

Texas's arguments thus misstate the standard. It is no surprise that the district court denied the plaintiffs full relief on a slim record and under extreme time pressure. Texas cannot shield its map from further constitutional review in reliance on relief that was, by its very nature, ephemeral and extraordinary.

3. Texas cannot evade review by relying on the court's interim findings.

Against this background, Texas could not reasonably have believed that the district court's interim findings established the ultimate validity of the districts incorporated in the 2012 plan. The State's current suggestion that it expected use of districts permitted by the interim plan to end the redistricting litigation therefore simply is not plausible.

a. Courts have long cautioned litigants against placing too much faith in preliminary findings. In circumstances generally similar to those here, the Second Circuit recently chided a state university for relying on statements in an order granting preliminary relief. As the Second Circuit explained:

> [The university]—or certainly its able counsel—surely knew the risks of such reliance. "A decision on a preliminary injunction is, in effect, only a prediction about the merits of the case," thus, "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding," and "do not preclude reexamination of the merits at a subsequent trial."

Biediger v. *Quinnipiac Univ.*, 691 F.3d 85, 107 (2d Cir. 2012) (quoting *Morris* v. *Hoffa*, 361 F.3d 177, 189 (3d Cir. 2004); *Camenisch*, 451 U.S. at 395; and *Irish Lesbian & Gay Org.* v. *Giuliani*, 143 F.3d 638, 644 (2d Cir.1998)).

Courts have likewise rejected similar reliance arguments by patent litigants. Defendants in a recent pharmaceutical case contended that they reasonably relied on the court's denial of preliminary relief in issuing a competing product. The court rejected this argument: "Although Defendants did not launch their generic product until after the preliminary injunction was denied, the preliminary injunction was, by definition, *preliminary* and not a final ruling on the validity of the * * * patent." *Sanofi-Aventis Deutschland GmbH* v. *Glenmark Pharms. Inc.*, 821 F. Supp. 2d 681, 695 (D.N.J. 2011), *aff'd and remanded*, 748 F.3d 1354 (Fed. Cir. 2014).

b. Appellate courts have similarly cautioned district courts against overreliance on their own preliminary findings.

As the Seventh Circuit has explained, "exclusive[]" reliance on preliminary findings "can be a risky approach. A court must be cautious in adopting findings and conclusions from the preliminary in-

junction stage in ruling on a motion for summary judgment." *Communications Maint., Inc.* v. *Motorola, Inc.*, 761 F.2d 1202, 1205 (7th Cir. 1985); see also *Lac Du Flambeau Band of Lake Superior Chippewa Indians* v. *Stop Treaty Abuse-Wis., Inc.*, 991 F.2d 1249, 1258 (7th Cir. 1993) ("[W]e have advised district courts to be cautious in [subsequently] adopting conclusions of law made in ruling on a preliminary injunction because the posture of the case at that time inevitably entails incomplete evidentiary materials and hurried consideration of the issues.").

Appellate courts thus frequently reverse grants of summary judgment where the district court improperly relied on denial of preliminary relief to justify summary judgment. For example, the Sixth Circuit reversed where the district court concluded that the "magistrate's recommendation denying the appellant's motion for a preliminary injunction, as adopted by the district court, was dispositive of the summary judgment motion." *William G. Wilcox, D.O., P.C. Employees' Defined Benefit Pension Tr.* v. *United States*, 888 F.2d 1111, 1113 (6th Cir. 1989). As the court explained, "a trial court's disposition of the substantive issues joined on a motion for extraordinary relief is not dispositive of those substantive issues on the merits." *Id.* at 1114. Other appellate courts agree,[11] as do the leading treatises. See,

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[11] See, *e.g.*, *Golden State Transit Corp.* v. *City of Los Angeles*, 754 F.2d 830, 832 n.3 (9th Cir.1985) ("As a general rule, decisions on preliminary injunctions do not constitute law of the case and 'parties are free to litigate the merits.'") (quoting *City of Anaheim* v. *Duncan*, 658 F.2d 1326, 1328 n.2 (9th Cir. 1981), *rev'd on other grounds*, 475 U.S. 608 (1986)); *Berrigan* v. *Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974) ("The decision of a trial or appellate court whether to grant or deny a preliminary

e.g., 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4478 (1981) ("Rulings that simply deny extraordinary relief for want of a clear and strong showing on the merits, or that are avowedly preliminary or tentative, do not trigger law of the case consequences.").

4. There is a procedure for combining preliminary hearings with a decision on the merits, but it was not used here.

Texas's reliance on preliminary findings is not only wrong; it ignores an established procedure for combining preliminary relief with a final decision on the merits. Neither the district court nor Texas pursued this procedure here.

Federal Rule of Civil Procedure 65(a)(2) sets out a process for combining preliminary and final relief: "Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing." Fed. R. Civ. P. 65(a)(2).

This procedure requires advance notice to the parties. As this Court has explained:

> Before such an order may issue, however, the courts have commonly required that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time

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injunction * * * does not limit or preclude the parties from litigating the merits * * * . [S]uch rulings [do] not preclude the district court, nor should they dissuade us, from taking a fresh look.") (footnotes omitted).

> which will still afford the parties a full opportunity to present their respective cases.

Camenisch, 451 U.S. at 395 (quoting *Pughsley* v. *3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972)).

If the Rule 65(a)(2) process is not specifically invoked, it is generally improper to adopt findings from a preliminary hearing at the merits stage without additional explanation. See, *e.g.*, *Sanchez* v. *Esso Standard Oil Co.*, 572 F.3d 1, 15 (1st Cir. 2009). "When a trial court 'disposes of a case on the merits after a preliminary-injunction hearing without expressly ordering consolidation * * * it is likely that one or more of the parties will not [have] present[ed] their entire case at [the] unconsolidated preliminary-injunction hearing.' Therefore, it is ordinarily improper to decide a case solely on such a basis." *Ibid.* (quoting 11A C. Wright, A. Miller, & E. Kane, *Federal Practice and Procedure* § 2950 (2009)).

Accordingly, the controlling principle is clear: preliminary findings of fact and conclusions of law are far from final. Litigants rely on such determinations at their peril, and the district court here would have *erred* had it found that its interim plan insulated the districts utilized in that plan from further review—that is, if it *had* done what Texas now says it *should have* done. That the Texas Legislature took account of the interim plan in 2013 when it drew Plan H358 may bear on the Legislature's intent at that time, but the existence of the plan cannot be a magic bullet that wins the case for the State or erases the intent that actually underlay the 201 plan..

C. Interim court approval of districts created with a discriminatory purpose does not launder out the discrimination when those same districts are re-enacted.

Texas also makes a closely related argument from the district court's promulgation of the interim plan. As Texas tells the story, the court blessed the districts challenged here, in the process laundering out the discriminatory intent of the 2011 Legislature. The Legislature's adoption of the interim plan, the story continues, then effectively became implementation of a benign court-ordered plan rather than reenactment of a discriminatory one. Texas Br. 36 (arguing that 2013 plan adopted simply to "bring existing litigation to an end"); see U.S. Br. 41. But this story is a tall tale. Texas's purported reliance on the district court's blessing cannot end the inquiry; the Legislature's *actual* intent remains subject to inquiry.

That determination "demands a sensitive inquiry into * * * circumstantial and direct evidence of intent." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). It has long been understood that evidence a court may consider in assessing legislative intent includes such considerations as (1) any disparate impact on the protected class; (2) "[t]he historical background of the decision * * * particularly if it reveals a series of official actions taken for invidious purposes"; (3) "[t]he specific sequence of events leading up to the challenged decision"; and (4) the "legislative or administrative history." *Id.* at 266-268 (citations omitted). And a closer "examination of the legislative scheme and its history demonstrates" that Texas's motive in enacting the 2013 redistricting maps was, in fact, to

disadvantage minority voters. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975).[12]

1. Texas's real motive was to re-enact the discriminatory 2011 maps.

In characterizing the legislative motive, Texas's central argument appears to be that, in re-enacting the district court's interim plan, the Texas Legislature's intent was simply to adopt a court-approved plan as a way to end the redistricting litigation, thus rendering irrelevant the 2011 plan (and the associated finding of improper motive). But the State's assertion of this anodyne intent cannot be the end of the story.

As the Court has held, "the mere recitation of a benign[] * * * purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Wiesenfeld*, 420 U.S. at 648. That the Texas Legislature chose to

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[12] Even accepting the State's counter-factual premise that Texas simply implemented a court-ordered plan in 2013 would not end the inquiry. Court-ordered plans may themselves violate the Constitution or the Voting Rights Act. See, *e.g.*, *Connor* v. *Finch*, 431 U.S. 407 (1977) (overturning a court-ordered reapportionment plan for failing to meet "one-person, one vote"); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975) (same). And when a legislature adopts a court's plan, the plan is still subject to substantive review. For example, under the Voting Rights Act, "[e]ven in the[] cases" where a court orders a plan, "if the governmental body subsequently adopts a plan patterned after the court's plan, Section 5 review would be required." See *McDaniel* v. *Sanchez*, 452 U.S. 130, 149 (1981). Whenever a legislature "submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them," substantive review is available. *Id.* at 153.

include in its permanent plan districts that the district court had approved for interim use says nothing about the Legislature's *actual* motive in making that choice; as with any statute, the 2013 redistricting plan is subject to examination under the ordinary standards used to determine legislative intent. See U.S. Br. 25 (citing *Hunt* v. *Cromartie*, 526 U.S. 541, 549 (1999)). Here, that inquiry leaves no doubt that Texas's real motive in 2013 was not to codify the 2012 interim plans or to avoid litigation; it was to leave the discriminatory 2011 maps in place.

By asking the Court to completely disregard the 2011 redistricting maps, Texas seeks to have its intent evaluated "only from the latest news about the last in a series of governmental actions." *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 866 (2005). "But," as the Court has stated, "the world is not made brand new every morning." *Ibid.* In arguing to the contrary, Texas is "simply asking [the Court] to ignore perfectly probative evidence." *Ibid.* In assessing legislative purpose, however, the Court is not "an absentminded objective observer," but one "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *Ibid.*

In fact, the 2011 plans remain relevant to the determining the intent of the 2013 Legislature—and powerfully demonstrate improper legislative intent in 2013—for several reasons.

First, under fundamental principles of statutory interpretation, courts presume that legislatures are aware of past legislative and judicial actions. Of particular relevance to this case,[13] a legislature "is pre-

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[13] Courts also presume that legislatures are aware of other substantially similar statutes, see, *e.g.*, *Lockhart* v. *United*

sumed to be aware of * * * [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Here, the Texas district court held that the Texas Legislature adopted the 2011 plan with a discriminatory purpose. And in 2012, even after the Texas court adopted its interim plan, the District Court of the District of Columbia held that the 2011 Texas congressional redistricting plan had been adopted with a discriminatory purpose and suggested in the strongest terms that the Texas House plan had been as well. *Texas* v. *United States*, 887 F. Supp.2d 133, 159-166, 177-178 (D.D.C. 2012) (noting, regarding House plan, that "the full record strongly suggest[s]" that the retrogressive effect "may not have been accidental"), vacated and remanded, 570 U.S. 928 (2013). Yet the Texas Legislature, aware of the holding that specific line-drawing decisions had been taken for discriminatory purposes, left those same lines in place in 2013. This failure of Texas to alter the 2011 maps "following a contemporaneous and practical interpretation" that they were racially discriminatory "is evidence of an intent to adopt such interpretation." 2B *Sutherland Statutes and Statutory Construction* § 49:9 (7th ed. 2017).

Second, Texas claims that the court below "confuses discriminatory *effect*, which at least is capable of being carried over from one law to another, with discriminatory *intent*, which decidedly is not." Texas Br. 17. But it is Texas that is confused. The argument here is not that the 2011 Legislature's intent

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States, 136 S. Ct. 958, 964 (2016); the common law, see, *e.g.*, *Smith* v. *Wade*, 461 U.S. 30, 34 (1983); and longstanding agency interpretations of statutes, see, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000).

was copied and pasted into to the 2013 legislation; it is that actors typically mean to accomplish the obvious and probable consequences of their actions, as Texas did when it left unchanged the discriminatory districts drawn by the Legislature in 2011. And "given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time, both because the State has created the dispute through its own unlawful conduct * * * and because discriminatory intent does tend to persist through time." *United States* v. *Fordice*, 505 U.S. 717, 746-747 (1992) (Thomas, J., concurring). That is particularly so given the lengthy history of redistricting violations in Texas, which should lead a court to view Texas's current protestations of innocence with a jaundiced eye: In every redistricting cycle since 1970, this Court has found that Texas violated the VRA with racially gerrymandered districts. See *LULAC* v. *Perry*, 548 U.S. 399 (2006); *Bush* v. *Vera*, 517 U.S. 952 (1996); *Upham* v. *Seamon*, 456 U.S. 37 (1982); *White* v. *Weiser*, 412 U.S. 783 (1973); *White* v. *Regester*, 412 U.S. 755 (1973).[14]

Third, the State argues that any "claims against Texas's 2011 redistricting plans became moot when the 2013 Legislature repealed the 2011 plan." Texas Br. 42 (internal quotation marks omitted). But this,

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[14] Texas had the second highest number of VRA Section 5 objections of any covered state. See Department of Justice, *Voting Determination Letters for Texas*, perma.cc/3CK4-KDKB. In at least 54 instances, Texas withdrew a proposed voting change after it became clear that it would not be pre-cleared. See Nina Perales, Luis Figueroa & Criselda G. Rivas, *Voting Rights in Texas: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 713, 714 (2008).

again, is an exercise in misdirection. The claim here is not that the district court retained the power to enter judgment on the merits of the 2011 redistricting plans; it is that the discriminatory intent of the 2011 plans remains relevant in assessing the validity of identical portions of the 2013 plans.

Fourth, even if it assumed that ending the litigation was *one* of Texas's motives,[15] that is not the end of the matter. Appellees need not "prove that the challenged action rested *solely* on [a] racially discriminatory purpose[]," or even that it "was the 'dominant' or 'primary' one." *Village of Arlington Heights*, 429 U.S. at 265 (emphasis added). Instead, a redistricting plan violates the Equal Protection Clause if racial discrimination was *a* motivating factor. And here, any hope that Texas entertained of ending this litigation by adopting the district court's interim plan was incidental to the Legislature's larger (and closely related) goal of insulating from further challenge maps that discriminated against Latino voters.

Fifth, and perhaps most notably, the district court *in fact* found that Plan H358 was enacted with a discriminatory purpose. Appellees recount the district court's findings in detail, showing that the Texas Legislature not only made no attempt to cure what the district court previously had found to be

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[15] And that is a dubious assumption; the district court found that the Texas Legislature "did not believe that passing the interim maps would end the litigation." H.J.S. App. 358a n.45. Rather, the Legislature knew that the "Plaintiffs would continue to pursue relief" as they had against the identical districts in Plan H283. *Ibid.* In fact, the court found that Texas Legislative Council Attorney Jeff Archer informed the legislators that "they had not realistically removed legal challenges to the plans apart from those areas remedied by the interim plans." *Ibid.*

discriminatory line-drawing, but "purposefully maintained the intentional discrimination contained in Plan H283" (H.J.S. App. 6a); that "the 2013 Legislature intended to continue the intentional discrimination found in Plan H283" (*id.* at 22a); that the Legislature in fact "intended any such taint to be maintained but be safe from remedy" (*id.* at 359a); and that the legislature acted with a strategy that was "discriminatory at its heart." *Ibid.* As appellees also show, this finding is reviewed under a highly deferential standard. Appellees' Br. 41-43. That finding is amply supported by the record and bolstered by the governing legal principles. It should be affirmed.

2. Texas had an affirmative duty to remove the taint of racial discrimination.

Finally, once a court determines that a state actor has engaged in purposeful discrimination, the "racial discrimination [must] be eliminated root and branch." *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-438 (1968). The proper remedy for an unconstitutional exclusion aims to "eliminate so far as possible the discriminatory effects of the past *and to bar like discrimination in the future.*" *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (emphasis added) (internal quotation marks and brackets omitted).

Once the district court found racial discrimination in the 2011 maps, the Texas Legislature was obligated to remove the discriminatory taint before enacting new maps. Texas contends that the imposition of this requirement "reverse[s] the burden of proof entirely." Texas Br. 31. But that is not so. We agree that the ultimate burden of proof remains on the plaintiffs. But to return to Justice Thomas's observation, in these circumstances "it is eminently reasonable to make the State bear the risk of nonpersua-

sion." *Fordice*, 505 U.S. at 746-747 (Thomas, J., concurring) (citations omitted). Whether or not the standard is formulated "in terms of a burden shift with respect to intent," the factors the Court "do[es] consider—the historical background of the policy, the degree of its adverse impact, and the plausibility of any justification asserted in its defense—are precisely those factors that go into determining intent under *Washington* v. *Davis*, 426 U.S. 229 (1976)." *Id.* at 747.

Here, the Texas Legislature "does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior" discriminatory legislation. *Fordice*, 505 U.S. at 728. But Texas has not "completely abandoned its prior [discriminatory] system." *Id.* at 729. Instead, "the State perpetuate[d] policies and practices traceable to its prior system that continue to have [discriminatory] effects," "run[ning] afoul of the Equal Protection Clause." *Id.* at 732. Cf. *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208 (1973) ("[A] finding of intentionally segregative school board actions" in one portion of the school system "creates a presumption" that other actions have the same intent.).

The common sense of the matter is not really debatable. In 2011, the Texas Legislature drew maps for the purpose of discriminating. Two years later, when given an opportunity to remedy this wrong, many of the same legislators, guided by the same legislative leadership, put in place *identical* maps that will have the *same* discriminatory effect. In this context, the contention that discriminatory intent has somehow fallen out of the case is, to quote Texas, "every bit as implausible as it sounds." Texas Br. 1.

CONCLUSION

If the Court does not dismiss the case for lack of jurisdiction, as appellees urge, it should affirm the judgment of the district court.

Respectfully submitted.

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[16] The representation of *amici* by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.